

Chapman Law Review

Volume 16 | Issue 2

Article 9

2013

Chasing Leadership Impunity: The Rapid Evolution of International Criminal Law

David Scheffer

Follow this and additional works at: <http://digitalcommons.chapman.edu/chapman-law-review>

Recommended Citation

David Scheffer, *Chasing Leadership Impunity: The Rapid Evolution of International Criminal Law*, 16 CHAP. L. REV. 395 (2012).
Available at: <http://digitalcommons.chapman.edu/chapman-law-review/vol16/iss2/9>

This Article is brought to you for free and open access by the Fowler School of Law at Chapman University Digital Commons. It has been accepted for inclusion in Chapman Law Review by an authorized administrator of Chapman University Digital Commons. For more information, please contact laughtin@chapman.edu.

Chapman University School of Law

Transcription of the Chapman Dialogue:
“Chasing Leadership Impunity: The
Rapid Evolution of International Criminal
Law”

Tuesday, November 13, 2012

Speaker:

*Ambassador David Scheffer**

My remarks in part will draw from my book *All the Missing Souls: A Personal History of the War Crimes Tribunals*. My address today is about the accelerated pace of international justice over the last 20 years. Every day the personal history recorded in *All the Missing Souls* resonates in contemporary international politics and law. Understanding why the highest political and military leaders are increasingly at risk of prosecution today and why the mission of accountability grows with every passing year requires looking back at least to the 1990s when, as I write in my book,

One of the most ambitious judicial experiments in the history of humankind—a global assault on the architects of atrocities—found its purpose as mass killings and ethnic cleansing consumed entire regions of the earth. The grand objective since 1993 has been to end impunity at the highest levels of government and the military not only for genocide, which captures the popular imagination with its heritage in the Holocaust, but also for the far less understood offenses of crimes against humanity and war crimes.

* Ambassador Scheffer is the Robert A. Helman Professor of Law and the Director of the Center for International Human Rights at Northwestern University School of Law in Chicago. In early 2012, Ambassador Scheffer was appointed the U.N. Secretary-General's Special Expert on United Nations Assistance to the Khmer Rouge Trials, and was selected by Foreign Policy Magazine as one of the "Top Global Thinkers of 2011." He has published extensively on international legal and political issues and appears regularly in the national and international media. Ambassador Scheffer is the former United States Ambassador-at-Large for War Crimes Issues, serving in that post from 1997-2001.

The building of institutions of international justice has had a lot to do with that new reality, namely, that impunity is on the losing side of history now.

Understanding why Moammar Gaddafi and his son Saif al-Islam and intelligence chief, al-Sanoussi, were indicted by the International Criminal Court last year, why Sudan's current president, Omar Al-Bashir, was indicted for genocide in Darfur, and defies to this day the authority of the same court, why Radovan Karadžić and Ratko Mladic are finally standing trial in The Hague before the Yugoslav tribunal, why former Liberian President Charles Taylor has been convicted and sentenced before of the Special Court for Sierra Leon, why three of the surviving top Khmer Rouge leaders of the Pol Pot regime are on trial today in Phnom Penh, and why the United Nations and U.S. Government are focusing more of their attention on atrocities prevention strategies today, takes us back to the 1990s when major failures occurred in reacting to atrocities, when the five major criminal tribunals were negotiated to lock in leadership accountability, and atrocities preventions gained a foothold within the federal bureaucracy.

I had the lead American job in building the international criminal tribunals for the former Yugoslavia, Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the permanent International Criminal Court. *All the Missing Souls* is the story of this transformational moment in history about the creation and rise of five war crimes tribunals in the 1990s.

That task occupied all eight years in the Clinton Administration for me, so I want to spend a few moments talking about my own role as it does frame a personal part of the history in this book and the modern story of international criminal justice. I was the "Ambassador to Hell," but also the "Ambassador to Hell and Back." In my more optimistic moments, I considered myself as a carpenter of war crimes tribunals. These courts would be the international community's frontal assault on impunity and often had to begin their work amidst ongoing atrocities.

I was on the Deputies Committee of the National Security Council, which thrust me into every major foreign policy decision in the Clinton Administration's first term, and had the first ever ambassadorship on war crimes during President Clinton's second term. I had the support of Madeleine Albright, who was a true leader on accountability for atrocity crimes. I had the privilege for eight years to work with the most powerful woman in the world, both when she was at the United Nations and then as the Secretary of State during those eight years. It was a tremendous privilege, and for those women in the room who will rise to such power in the future, I congratulate you, and I want to tell the men in the room that it is okay. You can work for them. It will be just fine. With Albright's support, I was able to press ahead, often against almost impossible resistance—from the Pentagon, from budget conscious and always-

questioning members of Congress, from foreign allies and foes, from the United Nations even, and from the intelligence community. I also describe in the book those situations where Albright and I had our disagreements.

I wanted to wait to write this memoir, which I prefer to describe as a personal history, because I quite purposefully wanted to describe the rapid evolution of international justice during the 1990s through my own lens because I was there, and I also wanted to reflect upon it for a good number of years before I wrote it.

I realized from the very beginning of my tribunal-building years in 1993 that there are many ways to approach the issue of evil. And there are now many books that brilliantly examine the sources of evil, not only for the Holocaust, but for the atrocities of our own time. How do men, and sometimes women, of power so readily and efficiently embrace evil and decimate vast numbers of human beings and inspire hundreds and thousands to join them in doing so? My book is not designated to answer that mega-question in part because many others have focused on that issue and because I think the answers are so complex and varied from one atrocity situation to another that singular formulas are folly. There is one exception: The former prosecutor of the International Criminal Court, Luis Moreno-Ocampo, often observes that leaders who commit atrocity crimes keep doing so to maintain their power. I firmly believe that this is a driving force behind evil of our time, just as it has been throughout recorded history.

The challenge that I faced, as did many others, in Washington and overseas, was how to discover the right formula in ever-changing circumstances to confront monstrous evil in the courtroom. Consider the realities of the early 1990s: Mass atrocities, leadership perpetrators, usually an ongoing and vicious armed conflict or at least a potentially resurgent one, a destroyed or failed court system, unwilling political leaders and a skeptical international community, much more focused on the peace or war equation of the conflict itself. That was the scenario facing us in so many atrocity zones, including the Balkans, Rwanda, and Sierra Leone in the 1990s. Cambodia was different only in that the atrocities had long ended in the 1970s, but the infrastructure was lacking and political landmines were all over the place. We were not starting from scratch because of the legacy of the Nuremberg and Tokyo military tribunals decades earlier, but ours was a very different challenge under far more complex circumstances. This would not be victors' justice, although some have viewed it as the powerful imposing justice upon the weak. Modern international justice is no simple code of criminal procedure either. The quest for justice meanders back and forth between international and domestic courts and between common law and civil law principles. Yet, the search for evil aimed for the civility of the courtroom and gained from the growing resolve that removing war criminals from politics and military leadership would make a difference.

We have witnessed a transformational era in confronting what I call “atrocities crimes”—genocide, crimes against humanity, war crimes, and pretty soon, there will be an operational crime of aggression in the jurisdiction of the International Criminal Court. The last twenty years have been nothing but revolutionary in how the world responds to atrocity crimes. I do not mean to say that we have come to learn how to effectively confront atrocities or the threat of them, and my book describes our failures in Rwanda, Bosnia and Herzegovina, and Sierra Leone. But I believe we have learned some lessons from those failures. Our actions in Kosovo in 1999, as described in the book, and in Libya in 2011 provide a new understanding of the value of military intervention or other measures under the fast-evolving responsibility to protect principle. Syria stands in stark contrast today to the momentum of both international justice and the responsibility to protect and it is a profoundly disturbing and regressive contrast. We also need to recognize, however, that in our lifetimes where so many transformational events have radically altered our lives and our societies—the collapse of the Soviet Empire and the end of the Cold War, cyberspace and a radically modernized social media market, the Arab Spring, Amazon, and an unimagined economic collapse in a much-heralded deregulated marketplace, there also was a transformation in international and national justice for atrocity crimes. What happened? To put it simply, we emerged from the old world into a new world. But what was the old world, namely that world before 1993?

In the old world we endured hundreds of international and internal armed conflicts after World War II. My colleague, Professor Cherif Bassiouni of DePaul University College of Law calculated that close to one hundred million people were killed in criminal acts far outside any legitimate use of military force during that post-World War II period. But only about 820 people were indicted for such crimes since World War II and most of those have flown under the radar, hardly known to the international community as examples of justice, and certainly with no known deterrent value in their face, which is all before national courts.

There were no international criminal courts, there was only the memory of Nuremburg and Tokyo and they were collecting dust, usually on law school library shelves. The exception to that that I will never forget is the book that I was reading every night during the first two months of the Clinton Administration. It was Telford Taylor’s *The Anatomy of the Nuremburg Trials*, which had just been published in 1992. It reminded me that Nuremburg happened, and it happened big time, and with tremendous input by the United States of America. And that actually inspired me in those very early months when we were building the Yugoslav tribunal.

In the old world, there was official impunity and only a few senior perpetrators had been prosecuted in domestic courts. The vast majority escaped any legal scrutiny: Pol Pot, Josef Stalin, Idi Amin, Papa Doc Duvalier, Hafez al-Assad, Nicolae Ceaucescu in Romania, Hale Mariam

Mengistu of Ethiopia, Sukarno and Suharto for the atrocities in Indonesia, only a Truth and Reconciliation Commission to account for the apartheid in South Africa, and only a handful of Argentinean officials domestically prosecuted for the “Dirty War.” The entire era of the Soviet Empire, which had just collapsed a few years earlier, remained essentially unaccounted for in any courts of law, and that remains the case today. The Communist world had scorned any true commitment to the rule of law and the free world exercised it with very great discretion.

We have poorly understood atrocity crimes. What did we really know about the crime of genocide, about crimes against humanity, and about war crimes? Yes, we have the records of the Nuremburg and Tokyo tribunals, but we have very little else. Crimes against humanity remained uncoded and dangerously vague. Genocide was tied to the Holocaust and the Genocide Convention of 1948, which had never been enforced. War crimes were tied to the Geneva Conventions in 1949, and yet, were rarely the object of court martials, and never, since Nuremburg and Tokyo, prosecuted internationally.

There also was weak national enforcement. Few states incorporated atrocity crimes into their domestic criminal codes, including the United States. And we had no experience in international jurists. There was no body of jurists to draw upon who understood how to integrate international criminal law, international humanitarian law, international human rights law, and the law of war into a valuable prosecutorial instrument in a war crimes tribunal. The experience just simply did not exist in the legal academy or the legal profession.

So then we have the new world, 1993 onwards. And things started to change in the 1990s and definitely have changed fundamentally by 2012. First, obviously the Soviet Empire is gone as is its anti-legal ideology. The rule of law has more of a fighting chance with new alliances of liberated nations seeking legitimacy through allegiance to international law, although performance often lags behind that allegiance.

There are now the international courts: the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leon, the Extraordinary Chambers in Courts of Cambodia, and the International Criminal Court. These are the five tribunals that frame so much of the narrative in the last twenty years. There also are special courts in East Timor, Sarajevo, Kosovo, and Bangladesh, with others being debated for Sri Lanka and Senegal today. The book that I have written is about the five major ones that were conceived in the 1990s and built. What I had to leave out of the book were my exhaustive efforts to build tribunals or jumpstart national prosecutions of the atrocity crimes that enveloped south Sudan, the Democratic Republic of the Congo, Burundi, Iraq under Saddam Hussein in the 1980s and 1990s, and Chechnya. All of those were on deck in the 1990s and consumed an enormous amount of my time as Ambassador, and yet, I ultimately failed to build tribunals for any one of

those mass atrocities. Nor did I write about East Timor in the book due to space and the fact that the Indonesian government refused to issue a visa for me to travel there because, as I understood it, they simply did not like my title, Ambassador at Large for War Crimes Issues. I did sometimes wonder if I should just change my title—so attractive to many of our allies, the NGOs, journalists and many members on Capitol Hill—to Ambassador at Large for Peace and Humankind, and just grab the damn visas and run with them.

But we now have the beginning of the end of impunity. Leaders have been indicted and some prosecuted—Slobodan Milosevic, Jean Kambanda (the Prime Minister of Rwanda during the genocide), Charles Taylor of Liberia, the top surviving Khmer Rouge leaders, Radovan Karadžić, Ratko Mladic, Moammar Gadhafi, Omar al-Bashir—so it is becoming more normal than abnormal to achieve accountability, at least through a level of indictment, if not ultimately a prosecution. President Omar al-Bashir of Sudan has been under indictment for several years by the International Criminal Court for genocide and other atrocity crimes in Darfur, and yet, he remains the leader of his country and has long been wreaking havoc in south Sudan. I think one way of looking at that is the failure for the international community to secure the arrest of President al-Bashir has left him free to wreak havoc on south Sudan, and he is doing it. As long as he remains outside of the reach of this court, because we cannot get to him, that situation continues. Yet, there has been a firm effort by many in the international communities to stand firm on the al-Bashir indictment despite the wishes of the African Union. The Security Council has not agreed to suspend the indictment on him, which they have the power to do under Article 16 of the Rome Statute of the International Criminal Court. The Security Council could actually instruct: “Put the indictment aside for a year at least; al-Bashir please come to the table and let’s talk; you are free to travel anywhere in the world without the threat of arrest; so will you now be a good guy?” There are enough members of the Security Council that do not trust him and have refused to use Article 16 authority, and I do not think they ever will for al-Bashir.

So far, from 1993 through July 1, 2012, the individuals, mostly leaders, charged with atrocity crimes before the tribunals already number in the hundreds: there have been 301 indictees; 253 surrendered or captured; 20 indicted fugitives still on the run; 156 defendants tried and convicted, while 23 have been acquitted; 24 defendants are in trial as 8 others await the judge’s opening gavel. A total of forty-eight indictees either had indictments withdrawn or they died while in custody prior to judgment. Thirteen cases were transferred by the Yugoslav tribunal to Sarajevo and the war crimes chamber there and were domestically prosecuted, while the Rwanda tribunal has transferred four cases to Kigali for trial there. Not a single indictee of the Yugoslav tribunal, the Special Court for Sierra Leon, or the Extraordinary Chambers in the Courts of Cambodia remains at large,

and nine indicted fugitives remain, as of July 1, at large for the Rwanda tribunal. Ten indictees remain at large with respect to the International Criminal Court at present.

Another big development in this rapid evolution of international justice has been our understanding of atrocity crimes. What are these crimes? What have the tribunals been doing to adjudicate these crimes, to elaborate upon them, to interpret them, to give them broader and more substantial meaning beyond the bare words of the statute? Just as our federal and state courts do with our statutes and our Constitution, what do these words actually mean? While the tribunals have been at it now for twenty years, I cannot keep up with it all at all times. I have students who write summaries for me. It is like, “Give me a memo that briefs me on the totality of decisions last month so I can get up to speed,” because it is a massive undertaking to keep up with the jurisprudence of all the tribunals now. There have been thousands of decisions, namely procedural decisions through the course of trials, and there certainly have been hundreds of judgments, all of those dealing with either procedural issues or with substantive law issues in the trials themselves.

Some examples: we now have a much better understanding of rape as part of genocide; aiding and abetting as part of genocide; gravity requirements for the commission of these atrocity crimes; command responsibility; specific intent and inferred intent; new or better understood crimes against humanity such as forced marriage, apartheid, forced pregnancy; persecution and modern forms of ethnic cleansing; and how to understand and prosecute the crime of torture.

We also now have an evolving understanding, although it has not been litigated yet, of the crime of aggression because in 2010 the States Parties of the International Criminal Court agreed to amend the Rome Statute so as to include a definition and an operational basis for the crime of aggression. That is not part of the court’s operational capacity yet—we have to wait until 2017 and thirty State Party ratifications of that amendment for it actually to kick in and not for all States, as it is a very complex formula of how the crime of aggression has been inserted into the Rome statute—but future work in this area is very much going to focus on the crime of aggression.

It is important to use and understand atrocity crimes as a preventative tool as well as an accurate description of what the tribunals are prosecuting. It is preventative in order to avoid the paralyzing consequences of awaiting genocide to spur policy makers into either action or retreat.

Arising from atrocity crimes, I have argued that a sophisticated body of law also has begun to emerge. I call it “atrocity law,” which is the law applied by, and developed further by, the war crimes tribunals. It is an intersection of international criminal law, of international humanitarian law, of international human rights law, and of the law of war. The common

mistake heard daily is to describe the law of the tribunals, or what is being violated in the field, as international humanitarian law. That is not necessarily the case. International human rights law is too broad as is international criminal law, which covers an enormous amount of criminality around the world. The law of war is too narrow for these tribunals. Any study of the war crimes tribunals and the law they are using has to recognize that it is of unique character, and should be described as such.

We do have stronger international enforcement now. Witness what has transpired in Bosnia and Herzegovina, namely the War Crimes Chamber in Sarajevo, and in Serbia, in Croatia, in Rwanda, and in the tens of countries that have upgraded their criminal codes as part of implementing the Rome Statute. Even in the United States there is a beginning, with Senator Dick Durbin's Genocide, Child Soldiers and Human Trafficking Accountability Acts, which were all enacted by Congress in the late 1980s. In fact, all were enacted in the last few years of the George W. Bush Administration. There is recently President Obama's executive order on war criminals of August 2011 and then in Spring 2012 he created the Atrocities Prevention Board.

My great hope in the next Congress is that the bill that Senator Durbin drafted a few years ago, namely the Crimes against Humanity Accountability Act, somehow could be resurrected in the new Congress and move forward. The reason I say that is because there are a lot of gaps in U.S. law with respect to the atrocity crimes. If one thinks one can enter a federal court today and prosecute someone for the crime of persecution, namely ethnic cleansing, that essentially is not possible. The international crime of persecution is not in the U.S. federal code, it is not in Title 18, it is not in the Uniform Code of Military Justice, it is just not there. I think it is extremely important that the United States have the capacity within its own courts, to get up to speed, to modernize its federal law so that we are capable of prosecuting these crimes in our courts. The more we are capable of doing so, the more we actually insulate ourselves from the reach of the International Criminal Court because under the principle on complementarity, the court has to defer to the national system if that country has the capacity in its courts to prosecute atrocity crimes and is genuinely able and willing to do so. Those nations that have ratified the Rome Statute, particularly America's European allies, Latin American allies, and Japan, have revised their criminal codes and they say, "We are not really worried about the ICC with respect to our country because we have a criminal code that covers all of this and if there is any suspicion on the part of the International Criminal Court with respect to one of our nationals, you bet we are going to get on top of this in our own courts and this thus compel the International Criminal Court to back off." I strongly believe that the United States should have that same capability.

There are experienced jurists now. I have had twenty years of excellent relationships with a large body of lawyers, investigators, and

judges from all around the world who have sat in these tribunals, have prosecuted, or have been defense counsel. This is grown into a very large legal academy now. They should create some association or something so we can keep track of them all. And our Justice Department now has scores of American lawyers, who as federal lawyers, joined the staffs of the tribunals and spent some time prosecuting or acting as defense counsel or as investigators. I gave a speech in Chicago a few years ago at the Drake Hotel, before a Justice Department annual conference of Justice Department lawyers. After I gave my speech I saw this group of lawyers approached me and said, "Ambassador Scheffer, hello, do you remember us?" Well, I had arranged for employment of so many of them in the tribunals back in the 1990s. And I had sort of forgotten faces, but it was an astonishing moment. They said, "This is what we are doing now in the Justice Department; we are actually dealing with human rights; we are dealing with war crimes in the Justice Department." And so we have this very rich reservoir of legal talent now not only in the United States but elsewhere that just did not exist twenty years ago.

Finally, there has been the influence of international politics. During the negotiations for the Rome Statute for the International Criminal Court in the 1990s, there was a lot of concern about the extent to which the Security Council would influence the work of this independent court. The United States position, as I write about in my book, was that the referrals that go to the International Criminal Court should be from the Security Council. Other countries wanted them also to be referred by State Parties and by an independent prosecutor that investigates and then convinces the judges to proceed with a case. The United States' position was that we wanted this court, but we wanted the Security Council referrals to frame the jurisdiction of the court. Why? A simple reason is that as a permanent member of the Security Council, the United States can exercise considerable control of the Security Council.

So much of the politics in the 1990s was this angst in the international community about Security Council control of the court and the United States had to keep pushing back on that fear. It is one of the great ironies in history that if one reads the debate from October 2012 in the Security Council, the President of the Security Council that month was the Permanent Representative of Guatemala. Guatemala is the latest State Party, the 121st State Party to the Rome Statute of the International Criminal Court. And as President of the Security Council, the Guatemalan Permanent Representative called a special one-day session on the relationship between the ICC and the Security Council. Reading through those statements, one discerns that there is a tremendous amount of angst these days by countries that the Security Council is not doing *enough* to help the court. It is not intervening to refer Syria to the International Criminal Court. It is not following through once it has made a referral of either Libya or Darfur. It is not following through to ensure the cooperation

of the States with the court to ensure that the prosecutor can investigate the crimes and follow through on the mandate given to her by the Security Council. There is no mandatory cooperation clause in those resolutions other than for the target country itself, and many other countries must be involved in cooperating with investigations. So, it is fascinating to observe this ironic twist that fourteen years later, from 1998 when the Rome Statute was finalized, there are countries seeking the help of the Security Council, because the Security Council actually has some clout and it actually can force governments to do things.

I want close with two basic arguments that are presented with respect to international justice today. One is the unending argument about deterrence and whether or not these courts actually achieve the goal of deterrence of these crimes. Well, I think the question of whether international tribunals *must* deter the killing is a straw man often used to actually denigrate international justice. One observes this in one article after another where scholars ask, because the Yugoslav tribunal did not actually deter the 1995 Srebrenica massacre, what is the worth of this tribunal?

The primary purpose of the international and hybrid criminal tribunal is to render justice and reveal some of the truth about what transpired in the commission of atrocity crimes in ravaged societies. That means investigating massive crimes and leadership suspects, indicting and prosecuting some of them and rendering judgment followed by either conviction or acquittal. It is a false burden to place on the shoulders of the tribunals to assess their legitimacy and utility by whether they have stopped the killing or deterred further on-going atrocity crimes or the commencement of future atrocity crimes. Such deterrence is a tremendous bonus if it occurs, and we hope for it, but that is not the primary purpose of the tribunals. Victims want top perpetrators to suffer punishment and that is precisely what criminal courts are designed to achieve. This is particularly true where there are tens and hundreds of thousands of victims and those responsible for such horrors controlled the levers of power.

Nonetheless, I argue that international tribunals have a generational impact on war-ravaged societies that ultimately impact societal norms and behavior. Professor Kathryn Sikkink of the University of Minnesota, in her book, *The Justice Cascade*, which I reviewed for the *New Republic* September 2011, uses comparative empirical research over the last three decades to demonstrate how human rights prosecutions at the domestic and international level in fact have influenced the decline in human rights abuses and atrocity crimes in the relevant nations and even in neighboring countries over the long term. I believe we will see similar results in the Balkans, several regions of Africa, and Cambodia in decades to come.

It is also very important to ask whether in the absence of tribunals and indictments, tyrants and atrocity lords are coming to the peace table and negotiating settlements to stop the killing. Does that empirical evidence

stand up to scrutiny any better than many examples in the last two decades where leaders under investigation or indictment lost their international legitimacy and ultimately their power? Consider the ultimate fates of Slobodan Milosevic, Jean Kambanda, Charles Taylor, Radovan Karadžić, Ratko Mladic, Moammar Gadhafi, and even President Omar al-Bashir of Sudan. Al-Bashir remains in power, but with far less legitimacy and influence internationally and a very limited flight pattern. President Bashar al-Assad of Syria has not relented anything in the absence of an indictment. Indeed, he seems to grow more defiant by the day. But I would argue that if the International Criminal Court obtained jurisdiction over the Syrian situation, following a Security Council referral, al-Assad's departure from Damascus would be accelerated and respect for human rights more likely for the Syrian people. International justice does not guarantee political defeat, and neither does the use of military force for that matter, but it has built an impressive record since 1993.

In the final analysis we need both tools—international justice and military force—to confront most effectively the challenges of atrocity crimes. How we use each tool and under what circumstances is the challenge of wise policy-making that is far removed from a knee-jerk resort to go-it-alone U.S. firepower that some continue to advocate.